PARUVATHY PALANY

v.

SATHIASEALAN GOVINDASAMY

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-918-1998]
16 NOVEMBER 1998

LEGAL PROFESSION: *Professional discipline - Practice and Etiquette Rules - Affidavit deposed by counsel for defendant - Whether counsel would become witness for defendant - Whether counsel would contravene r. 28(a) of Legal Profession (Practice and Etiquette) Rules 1978*

CIVIL PROCEDURE: *Solicitor - Counsel appearing for defendant - Whether court can refuse to permit appearance - Whether defendant has an absolute right to choice of counsel*

CIVIL PROCEDURE: *Originating summons - Whether complied with O. 7 r. 3(1) of Rules of High Court 1980 - Whether non-compliance curable - Rules of the High Court 1980, O. 2 r. 1 & O. 92 r. 4*

CIVIL PROCEDURE: *Mode of commencement - Proceedings relating to infants - Rules of the High Court 1980, O. 84 - Whether by way of originating summons - Whether originating summons with appearance in Form 6 or without appearance in Form 7 - Whether specified in Order 84 - Whether plaintiff was free to select either Forms - Whether plaintiff rightfully adopted Form 7*

CIVIL PROCEDURE: *Originating summons - Proper forum to hear application - Whether High Court in Johor Bahru or Seremban - Whether defendant took steps to transfer case - Courts of Judicature Act 1964, s. 20 - Whether there was delay - Whether delay prejudicial to case*

This was a case wherein the plaintiff filed an application by way of an originating summons in encl. 5 ('encl. 5') for the guardianship, care, control, custody and a monthly maintenance of RM500 of her infant boy aged 1 year 8 months, with the natural father having reasonable access thereto. In this instance, the court dealt with the preliminary objections of both parties before fixing the case for hearing.

The plaintiff alleged that the defendant's counsel ('the said counsel') should be barred from representing the defendant as the said counsel had deposed an affidavit that he was never instructed by the defendant to institute divorce

proceedings against the plaintiff. This was because the determination of whether the defendant had in fact contemplated divorce proceedings was of crucial importance to the case.

The defendant objected to the plaintiff's application in encl. 5 alleging that it did not contain any details of the question on which the plaintiff was seeking the court's determination nor did it contain sufficient particulars to identify the plaintiff's cause of action in respect of the relief or remedy she was claiming, as required by O. 7 r. 3(1) of the Rules of the High Court 1980 ('RHC'). Also, that the proper convenient forum to hear the said application would be the High Court of Seremban. Apart from this, the defendant contended that encl. 5 had not followed the correct Form in that the plaintiff should have filed an originating summons ('OS') with appearance in Form 6 and not an OS without appearance in Form 7.

Held:

[1] The facts showed that the defendant's counsel was personally involved in the case. There would be every possibility that he might be cross-examined on his affidavit, a prerogative of the plaintiff and exercisable by her at any time.

[2] If the said counsel became a witness for the defendant, he would find himself caught under r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 which states that an advocate and solicitor shall not appear in court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interest.

[3] The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right. The position would also be the same if another legal assistant from the same firm is allowed to represent the case whether in chambers or in open court. (*Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkal Sen Tak*)

[4] There was no reason to dismiss the plaintiff's application as it was rightly filed by way of an OS. A concise statement of the relief claimed in the proceedings begun by OS with sufficient particulars to identify the cause of action was fulfilled by the plaintiff, thus falling within the ambit of O. 7 r. 3(1) of the RHC. The intitulement of the OS stated

with sufficient particularity the statutes which it relied upon to move this court.

[5] This application was in regard to a proceeding relating to an infant boy governed by O. 84 of the RHC. Order 84 of the RHC states that when there is no pending action in respect of an infant, any application must be made by way of an OS. It is totally silent on the type of OS to be used. As such, the plaintiff was free to select either Form 6 or Form 7 and the plaintiff chose Form 7.

[6] An OS **without** appearance in Form 7 allows the Registrar to fix a date for the hearing of the OS upon sealing of the same. An OS **with** appearance in Form 6 will have to go through the cumbersome procedures set out in O. 28 r. 2(1) of the RHC before a hearing date is given. As a matter of practice, an OS without appearance is almost invariably filed by legal practitioners in Johor Bahru for an expeditious hearing of an OS in respect of custody applications involving infants. Thus, the plaintiff in filing encl. 5 by way of an OS without appearance in Form 7 was perfectly correct in adopting that mode of procedure.

[7] Even if encl. 5 did contravene O. 7 r. 3(1) of the RHC and O. 7 r. 2 of the RHC, non-compliance was a mere irregularity curable by O. 2 r. 1 of the RHC and O. 92 r. 4 of the RHC. Every omission or mistake in practice or procedure should be regarded as an irregularity which the court could and should rectify so long as it would not cause an injustice. There was no prejudice or injustice to the defendant when the plaintiff filed encl. 5.

[8] In the interest of the parties and for the ends of justice, the High Court of Johor Bahru was the right forum to hear encl. 5. In any event, the defendant had yet to take the necessary steps under s. 20 of the Courts of Judicature Act 1964 to transfer the case to Seremban. That section provides that the distribution of business among the judges of the High Court is at the direction of the Chief Judge. There can be no appeal against any direction given by the Chief Judge. It is inadequate and insufficient to merely raise a techical objection.

[8a] There was delay occasioned by the defendant's omission to transfer the case to the High Court of Seremban. Enclosure 5 sought for the guardianship, care, control, custody and maintenance of a boy aged 1 year 8 months. Any further delay would be extremely prejudicial to the infant boy.

[Plaintiff's preliminary objections allowed with costs; defendant's preliminary objections dismissed with costs.]

Case(s) referred to:

American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 ***(refd)***

Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman [1995] 4 CLJ 127 ***(refd)***

Chong Siew Choong v. Public Prosecutor [1996] 2 CLJ 823 ***(refd)***

Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd [1998] 2 MLJ 167 ***(refd)***

Helen Ho Quee Neo v. Lim Pui Heng [1974] 2 MLJ 51 ***(refd)***

J v. C [1970] AC 668 ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***

Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1980] 1 MLJ 189 ***(refd)***

Lewis v. James 32 Ch D 331 ***(refd)***

Malayan United Finance Bhd v. Sun Chong Construction Sdn Bhd & Ors [1995] 4 MLJ 741 ***(refd)***

Perbadanan Pembangunan Pulau Pinang v. Chong Ah Yok [1993] 2 CLJ 351 ***(refd)***

Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd [1997] 1 MLJ 409 ***(refd)***

Punton v. Ministry of Pensions [1963] 1 WLR 186 ***(refd)***

Re CHS [1997] 3 MLJ 152 ***(refd)***

Re McGrath [1893] 1 Ch 143 ***(refd)***

Re Smith and Fawcett [1942] Ch 304 CA ***(refd)***

Rohana bte Ariffin v. Universiti Sains Malaysia, Hashim Hussin Yaacob v. Universiti Sains Malaysia [1988] 1 CLJ 559 ***(refd)***

R Saraswathy v. R. Palakrishnan [1986] 1 CLJ 544 ***(refd)***

R v. Secretary of State for India in Council & Ors, ex parte Ezekiel [1941] KB D 546 ***(refd)***

Saraswathy Devi a/p Nadchatiram v. Vijayalakshmi Devi a/p Nadchatiram [1998] 1 MLJ 89 ***(not foll)***

Shea v. Green 2 TLR 533 ***(refd)***

Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 ***(refd)***

Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak [1997] 3 CLJ 754 ***(foll)***

Tang Choon Keng Realty (Pte) Ltd v. Tang Wee Cheng [1992] 2 SLR 1114 ***(refd)***

V. Solai v. Mariayee [1954] MLJ 256 ***(refd)***

Wee Chow Yong t/a Viena Music Centre v. Public Finance Bhd [1990] 1 CLJ 176 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 20

Divorce and Matrimonial Proceedings Rules 1980, r. 102(1), (2)

Guardianship of Minors Act 1971, s. 1

Guardianship of Infants Act 1961, ss. 3, 5, 10, 11

Interpretation Acts 1948 and 1967, s. 62

Law Reform (Marriage And Divorce) Act 1976, ss. 77, 88(3), 93(1)

Legal Profession Act 1976, s. 94(3)(n), (o)

Legal Profession (Practice and Etiquette) Rules 1978, rr. 4, 5(a), 28(a)

Married Women and Children (Maintenance) Act 1950, s. 3

Rules of the High Court 1980, O. 2 rr. 1(1), 2(1), O. 7 rr. 2(1), 3(1), O. 28 rr. 2(1), 7, O. 38 r. 2(3), O. 53 r. 2(4), O. 69 r. 4(2), O. 84, O. 92 r. 4

For the plaintiff - Mathews George; M/s Danaraj Mathews Jimmy & Sara
For the defendant - CS Murtti; M/s T Rajagopalu & Co

Reported by Usha Thiagarajah

JUDGMENT

Introduction

This is an application in encl. 5 for, *inter alia*, the guardianship, care, control and custody of a boy aged 1 year 8 months to be given to his natural mother with the natural father having reasonable access thereto. The natural mother is of course the present plaintiff while the natural father is the present defendant. Enclosure 5 too prays for maintenance of RM500 per month to be paid by the defendant to the plaintiff for the benefit of the boy with effect from the date of the order and thereafter from the 7th of each month. The plaintiff too seeks in encl. 5 for the costs of the application to be borne by the defendant and payable to the plaintiff. Winslow J speaking for the Singapore's Court of Appeal in *Helen Ho Quee Neo v. Lim Pui Heng* [1974] 2 MLJ 51, sets out the correct approach to be adopted in a custody matter as seen at pp. 52 and 53 of the report:

> Thus, it is possible for one parent who is otherwise unimpeachable and is in a better financial position to provide the means for promoting its educational and material welfare to be given custody jointly (or separately) with the other whereas the other may be given care and control over it because it may be preferable in the child's interests that it should be placed in the latter's care in view of the greater devotion which the latter may be able to bestow. All the relevant facts and circumstances should be considered bearing in mind the paramount interests of the child even though no hard and fast rule can be laid down based on the sex of the parent or the child as to who should have its care and control and/or custody. In our view, the correct approach is summed up admirably by Harman L.J. in *Re C(A) (an infant)* [1970] 1 ALL ER 311 as follows:
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> > I can see nothing wrong in the consideration of the law which the learned judge applied. He did not, I think, give too much weight to the father's position. He looked, as he should, at the whole background and considered where had the infant better be - and that is really the only question that the court has to ask. I do not at all agree with expressions of opinion which have fallen, perhaps *per incuriam*, from judges that a boy should, as a matter of principle, be with his father - just as much as I disagree with the other 'principle' which has altogether been abandoned, that a girl of under three should, as a matter of principle, be with her mother. Other things being equal, these things may be so, but there is no principle involved in either. They are merely considerations which may weigh with the judge where the scales are nicely balanced.

In our judgment, having considered all the facts, both disputed and otherwise, the proper order to make was to reverse the order for custody made by the judge and order that the appellant should have such custody, including care and control over the child and responsibility for its upbringing. This would ensure that during his tender years he would have the benefit of being brought up by his own mother as opposed to being brought up in a haphazard way by others to whom the respondent might feel disposed to entrust his upbringing. We considered that this change would not affect him adversely as the judge thought but that it would be to his decided advantage in his formative years to be with his mother in all the surrounding circumstances.

Preliminary Objections

Both parties, in an attempt to outwit one another, have raised preliminary objections. I will proceed to examine the preliminary objections raised by Mr. Mathews George on behalf of the plaintiff. It is Mr. Mathews George's stand and the brunt of his preliminary objections that:

(1) Mr. T. Rajagopalu is barred from representing the defendant;

(2) The law firm of Messrs T. Rajagopalu & Co should not appear on record as the solicitors for the defendant;

(3) Mr. C.S. Murtti and all the other legal assistants and partners of Messrs T. Rajagopalu & Co should be barred from appearing or acting for the defendant in the present case;

(4) That Mr. C.S. Murtti is barred from representing the defendant as counsel appointed by Messrs Syed, Arafat & Bukhari; and

(5) The defendant should be represented by another counsel from the law firm of Messrs Syed, Arafat & Bukhari.

and on the facts, I entirely agree with him and orders to that effect were made. I will now proceed to set out the reasons for this course of action.

It seems that the preliminary objections arose because Mr. T. Rajagopalu deposed an affidavit on 27 July 1998 as reflected in encl. 12 to the effect that he was never instructed by the defendant to institute divorce proceedings against the plaintiff. The affidavit in encl. 12 was filed purportedly to negate the plaintiff's averments in encl. 9 at paras. 37 to 40 which, *inter alia*, stated that the defendant had deposited the marriage certificate and other documents with Mr. T. Rajagopalu for the purpose of instituting divorce proceedings. It was obvious that the determination of whether the defendant had in fact contemplated the divorce proceedings was of crucial importance as:

(1) it goes towards the credibility of the parties bearing in mind their respective averments; and

(2) it ascertains, in a way, the *bona fide* of the defendant in resisting the plaintiff's application on the pretext that the defendant still wants the plaintiff back and that he still loves her.

It must be borne in mind that Mr. T. Rajagopalu's averments in encl. 7 has been contradicted to a large extent by the affidavit of the plaintiff's father by the name of Palany a/l Arumugam as seen in encl. 14 that was affirmed on 7 August 1998. In essence, the plaintiff's father deposed that Mr. T. Rajagopalu had told him in no uncertain terms that the defendant had deposited the marriage certificate and other documents with him in order to institute divorce proceedings against his daughter. In the office of Mr. T. Rajagopalu, the latter said to the plaintiff's father:

> This is madness, both are educated, why can't they sort things out and live a normal life.

The plaintiff's father further deposed that Mr. T. Rajagopalu had openly said the following words:

(a) "I am the one who instructed Sathiasealan to send his mother and sister away so as not to have any misunderstanding between mother in law and daughter in law."

(b) "I am going to meet them tonight and have discussions. Also, if possible, to send them for counselling."

(c) "If this fails, I have no choice but to proceed with the divorce proceedings or we settle things out of court."

The defendant took a stand that sided Mr. T. Rajagopalu for in his affidavit in encl. 10 that was affirmed on 25 July 1998 particularly paras. 31.2 to 32.2, the defendant refuted the averments of the plaintiff and her father. Of significance to note would be the averment by the defendant in encl. 10 to the effect that Mr. T. Rajagopalu "is a family friend and family lawyer." Mr. T. Rajagopalu too in encl. 12 at para. 6.2. deposed that the defendant's family "is very close to him and that he frequents the defendant's house very often."

From the recital of the brief facts, it is crystal clear that Mr. T. Rajagopalu is personally involved in the whole episode. There would be every possibility that Mr. T. Rajagopalu might be cross-examined on his affidavit, a prerogative of the plaintiff and exercisable by her at any time. Order 38 r. 2(3) of the Rules of the High Court 1980 ("RHC") states as follows:

> In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application

> any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

and the affidavit of Mr. T. Rajagopalu may be allowed to be used in court even though the cross-examination is pending (*Lewis v. James* 32 Ch. D 331). Of pertinence to note would the principle of law gleaned from the case of *Shea v. Green* 2 TLR 533 which states that the court may refuse to act on an affidavit where the deponent cannot be cross-examined. Then there is the principle of law which states that where there is a question of motive or of good faith of a deponent, the court ought not to be asked to act without cross-examination (*Re Smith and Fawcett* [1942] Ch 304 CA). The court certainly has a discretion to allow a party to cross-examine a deponent. Chan Sek Keong J in *Tang Choon Keng Realty (Pte) Ltd v. Tang Wee Cheng* [1992] 2 SLR 1114 succinctly said at p. 1142 of the report that ".... in an action tried on affidavits a party who has sworn an affidavit may be subject to being cross-examined on it." Salleh Abas FJ sitting in the High Court in the case of *Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd* [1980] 1 MLJ 189 aptly said on the issue of cross-examination at p. 190 of the report:

> To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits, I take it, is a matter of court's discretion. In appropriate circumstances, there is no reason why such application should be refused merely because the deponent is a foreigner living outside the jurisdiction (*Re Lucas* [1952] 1 ALL E.R. 102; "otherwise foreigners would have an advantage" (*Strauss v. Goldschmidt* 8 S.L.R. 239)). It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause vexatious or motivated by desire to delay the proceedings (*Allen v. Allen* [1894] P. 239).

It was argued by Mr. CS Murtti for the defendant that the plaintiff has yet to file an application to cross-examine Mr. T. Rajagopalu and the issue of whether the latter would become a witness was irrelevant. Mr Mathews George was more practical in his approach. It was his contention that Mr. T. Rajagopalu should cease to act for the defendant in the wake of the objection advanced by the plaintiff and Mr. T. Rajagopalu should not wait until an application to cross-examine him would be made. In the event the plaintiff files an application to cross-examine Mr. T. Rajagopalu and the court accedes to that application, the latter may find himself in an awkward and embarrassing situation. Mr. C.S. Murtti contended that since encl. 5 will be heard and disposed off by way of an affidavit evidence, the defendant had no choice but to introduce Mr. T. Rajagopalu's affidavit in order to rebut the plaintiff's

averments. Indeed this move was not disputed at all by the plaintiff. It was the plaintiff's stand all along that having elected to enter the arena of battle by filing encl. 12, Mr. T. Rajagopalu and his legal assistants should have left the conduct of this case to another legal firm. An ostensible act of relinquishing the conduct of this case to another law firm but without a firm commitment thereto would run foul of rr. 4 and 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978. For convenience, these self explanatory rules are now reproduced hereinunder:

> 4. No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.
>
> 5. (a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

Mr. T. Rajagopalu may end up as a witness for the defendant and he would find himself caught under r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 which states that an advocate and solicitor shall not appear in court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interest. Now, when Mr. T. Rajagopalu filed an affidavit in encl. 12 to rebut the affidavit of the plaintiff in encl. 9, he took a perilous course of action because at that point of time he wore a different headgear - that of a witness and not that of a counsel for the defendant. It must have been apparent to Mr. T. Rajagopalu that when he affirmed encl. 12, he was no longer acting as counsel for the defendant. The plaintiff's father's further affidavit in encl. 14 sealed the fate of Mr. T. Rajagopalu once and for all. By that further affidavit in encl. 14, the role of Mr. T. Rajagopalu as a witness was further highlighted and emphasised. By way of an analogy the case of *Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 CLJ 754, [1997] 3 AMR 2947, [1997] 5 MLJ 705 should be referred to. There the issues were: (1) whether it was desirable for a solicitor to appear as a counsel in a trial when he was required to be a witness in the same trial on a material question of fact; (2) whether it was permissible for a legal assistant of a firm to replace another colleague who will become a witness for the opposite party; (3) whether the law firm should remain on record as solicitors when one of its lawyers was required as a witness; (4) whether the court has the inherent power to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular

case; (5) whether the right of a particular individual to be represented by an advocate and solicitor of his own choice is absolute. The facts of *Syarikat Pengangkutan Sakti Sdn Bhd [supra]* may be stated as follows. The plaintiff engaged an advocate and solicitor, Mr. Gana Muthusamy ('Mr. Muthusamy'), for the purpose of getting back his motor van from the defendant's workshop when the latter had refused to return unless the plaintiff settled a sum of RM1,267. On the basis of that retainer, Mr. Muthusamy proceeded to the defendant's workshop accompanied by a representative from the plaintiff's company. At the defendant's workshop, Mr. Muthusamy spoke to one Tan Joo Khing and tried to persuade him to release the motor van with an undertaking by the plaintiff to settle all the charges payable to the workshop but without prejudice to the right of the plaintiff to litigate the matter in a court of law. However, the attempt by learned counsel failed. Subsequently, the law firm of Messrs Gana Muthusamy & Co served on the defendant a writ of summons indorsed with a statement of claim and a summons in chambers with two affidavits. At the hearing of the summons in chambers, counsel for the defendant raised a preliminary objection to the effect that the law firm of Messrs Gana Muthusamy & Co should not appear on record as solicitors for the plaintiff since Mr. Muthusamy would be called as a witness. Further, she also submitted that not only Mr. Muthusamy ought not to appear for the plaintiff but the law firm as a whole, including the legal assistants, should not appear or act for the plaintiff, be it in chambers or in open court. In allowing the preliminary objection and ordering the plaintiff to engage a new counsel, the court held as follows: (1) To allow the plaintiff's counsel or his legal assistant to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of clear words in s. 94(3)(n) and (o) of the Legal Profession Act 1976. As advocates and solicitors, they should have due regard to their client's interests and must conduct themselves with decorum so as not to bring the legal profession into disrepute. The law firm of Messrs Gana Muthusamy & Co would equally be infected and should not remain on record as solicitors for the plaintiff for the simple reason that Mr. Muthusamy owned the firm. (2) When Mr. Muthusamy visited the defendant's workshop and spoke to Tan Joo Khing, he became a witness on material and disputed questions of fact. By virtue of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, Mr. Muthusamy should be barred from representing the plaintiff, be it in open court or in chambers, as he should not be allowed to be a witness for the defendant and counsel for the plaintiff at the same time. The court further held that the rules must be complied with for an orderly conduct of litigation and to maintain and observe the standard of conduct required of members of this august profession. The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular

individual in a particular case. Faced with this sanction, it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right (*R v. Secretary of State for India in Council & Ors, ex parte Ezekiel* [1941] KB D 546). (3) The position would also be the same if another legal assistant from the same firm is allowed to represent the case whether it is in chambers or in open court. To say that Mr. Muthusamy would not be involved in the case at all is wrong. No doubt he would not appear in chambers and in open court for the case but indirectly he would be involved. He cannot conduct with decorum and avoid a conflict of interest situation if his legal assistant is allowed to represent the plaintiff in the present case, be it in chambers or in open court, since he owned the law firm and that law firm should not appear on record as solicitors.

Obviously on the strength of *Sykt Pengangkutan Sakti Sdn Bhd [supra]*, Mr. T. Rajagopalu, his law firm and his partners and legal assistants should be barred from representing the defendant. In the face of the preliminary objection, a notice of change of solicitors was filed on 29 August 1998 as reflected in encl. 15 and Messrs Syed, Arafat & Bukhari became the solicitors for the defendant replacing the law firm of Messrs T. Rajagopalu & Co. With this change of solicitors, the plaintiff's preliminary objections appear to be academic but Mr. CS Murtti of Messrs T. Rajagopalu & Co was still bent on representing the defendant as counsel for the newly appointed legal firm of Messrs Syed, Arafat & Bukhari. This was the tactical ingenuity of Mr. CS Murtti which should be nipped in the bud. In resolving the preliminary objections, I have kept in the forefront of my mind, the crucial words of s. 11 of the Guardianship of Infants Act 1961:

> The Court shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

The English equivalent would be s. 1 of the Guardianship of Minors Act, 1971 which states, *inter alia*, that "the court shall regard the welfare of the minor as the first and paramount consideration" and Lord MacDermott explained these words in the case of *J v. C* [1970] AC 668 at p. 710 in these words:

> It seems to me that they must mean more than the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think that they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed is that which is most in the interest of the child's welfare as that term has

> now to be understood. That is the first consideration because it is of the first importance and the paramount consideration because it rules on or determines the course to be followed.

Lindley LJ in *Re McGrath* [1893] 1 Ch 143, 148 once said:

> But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its wider sense. The moral and religious welfare of the child must be considered as well as its physical well being. Nor can the ties of affection be disregarded.

Notwithstanding the fact that the welfare of the boy is of paramount importance and the preliminary objections can be said to be of secondary importance, yet this court is duty bound to consider the preliminary objections and make rulings thereto before proceeding with the merits of the whole case. The case of *Saraswathy Devi a/p Nadchatiram v. Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89, a decision of the Court of Appeal, are factually different from the present case. There it involved a solicitor who was entitled to a share in land from an arrangement of a family company which became involved in civil suits and the question that arose for determination was whether the solicitor should be restrained from acting for the family company. NH Chan JCA delivering the judgment of the Court of Appeal had this to say at pp. 96 to 97 of the report:

> A personal relationship between a solicitor and his client can only mean a relationship (meaning an association) which is personal between them. A working relationship between partners of a firm is not a personal relationship, so that a lawyer can always act for his firm. A sexual relationship between two people is a personal relationship. However, there would be a personal relationship between them if their association is something which is more than that of a professional one. There is nothing to suggest that the relationship between *Saraswathy* and her clients is anything but a professional one which is that of a solicitor and client relationship. There is no personal (meaning individual; private; one's own) relationship between *Saraswathy* and her kin which is outside that of a professional relationship of solicitor and client. Rule 3 of the Practice and Etiquette Rules does not prohibit a solicitor from acting for his client merely because he is related by blood to his client. For the prohibition to apply, the relationship must be that of a personal one, meaning an individual or a private relationship which is beyond that of a solicitor and client relationship.

Here, there was no material to show that Mr. T. Rajagopalu was related by blood to the defendant and, consequently, it would be a fallacy to mechanically apply the case of *Saraswathy Devi a/p Nadchatiram v. Vijayalakshmi Devi a/p Nadchatiram [supra]* to the present case. Mr. T. Rajagopalu's status as counsel for the defendant would immediately change once the plaintiff seeks

to cross-examine him in the witness-box. Must this court wait for that to happen? Certainly not. For the reasons adumbrated above, I allowed the plaintiff's preliminary objections with costs.

I will now proceed to examine the defendant's preliminary objections and they may be stated as follows:

(a) the originating summons in encl. 5 which was dated 10 June 1998 contravened O. 7 r. 3(1) of the RHC for the simple reason that it did not contain any details of the question on which the plaintiff was seeking the court's determination or direction nor did it contain sufficient particulars to identify the plaintiff's cause of action in respect of the relief or remedy which she was claiming;

(b) the originating summons in encl. 5 contravened O. 7 r. 2(1) of the RHC; and

(c) the proper and convenient forum to hear the originating summons in encl. 5 would be the High Court of Seremban.

and for these reasons, so it was argued, the defendant's preliminary objections should be entertained and encl. 5 be dismissed with costs. Order 7 r. 3(1) of the RHC states as follows:

> 3(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

while encl. 5 is worded in this fashion:

DI DALAM MAHKAMAH TINGGI DI JOHOR BAHRU
DALAM NEGERI JOHOR, MALAYSIA
SAMAN PEMULA NO: 24-918 TAHUN 1998

Di dalam Perkara Hak Penjagaan dan Kanak DHEVASEALAN A/L SATHIASEALAN.

DAN

Di dalam Perkara Aturan 84 Kaedah-Kaedah Mahkamah Tinggi 1980.

DAN

Di dalam Perkara Seksyen 77, 88 dan 93 Akta Pembaharuan Undang-Undang (Perkahwinan dan Pen-ceraian) 1976.

DAN

Di dalam Perkara Seksyen 3, 5, 10 dan 11 Akta Penjagaan Kanak-Kanak 1961 (Akta 351).

DAN

Di dalam Perkara Seksyen 3 Akta Perempuan Berkahwin dan Kanak-Kanak (Nafkah) 1950 (Dipinda 1981).

ANTARA

PARUVATHY A/P PALANY ... PLAINTIF

DAN

SATHIASEALAN A/L GOVINDASAMY ... DEFENDAN

SAMAN PEMULA

BENARKAN Defendan hadir di depan Hakim (1) di dalam Kamar pada 8hb Julai 1998 pada jam 9.00 pagi/petang untuk mendengar permohonan Plaintif untuk perintah-perintah:

(a) Bahawa hak penjagaan (guardianship) dan hak pemeliharaan (care), penguasan (control) dan jagaan (custody) ke atas kanak-kanak DHEVASEALAN A/L SATHIASEALAN 1 tahun 8 bulan diberikan kepada Plaintif dengan akses kepada Defendan pada hari Sabtu dan Ahad dari pukul 8.00 pagi hingga 6.00 petang di rumah Plaintif.

(b) Bahawa Defendan membayar kepada Plaintif wang sejumlah RM500.00 sebulan sebagai nafkah kepada kanak tersebut dari tarikh perintah ini dan seterusnya pada atau sebelum 7hb tiap-tiap bulan.

(c) Bahawa kos permohonan ini ditanggung dan dibayar oleh Defendan kepada Plaintiff.

(d) Lain-lain relief yang difikirkan wajar dan adil diberikan oleh Mahkamah yang Mulia ini.

Bertarikh pada 10 haribulan Jun 1998

Sgd (Illegible)
Penolong Kanan Pendaftar,
Mahkamah Tinggi,
Johor Bahru.

Memorandum untuk diindorskan ke atas Saman.

SAMAN ini telah dikeluarkan oleh Tetuan Danaraj Mathews Jimmy & Sara, Peguambela & Peguamcara yang beralamat di Suite 05-07, Level 5, Wisma Maria, Jalan Ngee Heng, 80100 Johor Bahru.

(No. Rujukan: DMJS/JB 453/98 FAM/MG/y).

Nota:- Saman ini tidak boleh diserahkan lebih dari 12 bulan dari tarikh di atas kecuali ianya dilanjutkan oleh perintah Mahkamah.

Jika Defendan tidak menghadiri sendiri atau melalui Peguamcaranya pada masa dan tempat yang dinyatakan di atas, Perintah boleh dibuat terhadap atau berhubung dengan defendan sepertimana yang difikirkan sesuai dan munasabah oleh Mahkamah ini.

Lord Denning M.R. in *Punton v. Ministry of Pensions* [1963] 1 WLR 186; [1963] 1 All ER 275 CA rightly pointed out that an originating summons remains a sensible and modern way of obtaining a declaration or determination of a point of law. NH Chan JCA in *Saraswathy Devi a/p Nadchatiram v. Vijayalakshmi Devi a/p Nadchatiram [supra]* had this to say of O. 7 r. 3 of the RHC at p. 95 of the report:

Order 7, rule 3 of the Rules of the High Court 1980 ["RHC"] provides that every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

The instant originating summons does not contain any details of the questions on which Vijayalakshmi is seeking the court's determination or direction nor does it contain sufficient particulars so as to show what her cause of action is in respect of which she is asking relief or remedy. Merely asking the court for an injunction against Saraswathy and her firm from acting in the four remaining civil suits under the Legal Profession Act 1976 or under its Rules is not enough. The originating summons must show why she or her firm should not act in the proceedings. Since this is not shown, no cause of action is disclosed in the originating summons against Saraswathy. On this ground alone, the originating summons ought to have been dismissed.

At p. 96 of the report, his Lordship NH Chan JCA continued and likened an originating summons with a statement of claim in these words:

So that an originating summons is just like a pleading in a statement of claim, it must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed. In other words, an originating summons, like a statement of claim, must disclose a cause of action. Therefore, if the summons itself, as in the instant case, does not disclose any cause of action, it can be dismissed.

In *Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409, Kamalanathan Ratnam JC (as he then was) in the context of O. 7 r. 3(1) of the RHC said at p. 417 of the report:

However, this originating summons filed by the plaintiff did not contain any such statement of questions for the court's determination or direction nor was there a concise statement of the relief or remedy claimed and neither was there a statement with sufficient particulars to identify the cause or causes of action in respect of which it wishes to claim that relief or remedy, but merely contained the prayers it wished for as follows:

(a) Penentang dilarang memfailkan dan/ atau meneruskan petisyen penggulung-an terhadap pemohon hingga perintah lanjutan.

(b) Ganti rugi ditaksir oleh penolong kanan pendaftar.

(c) Kos dalam kausa.

(d) Apa-apa relief lain yang dianggap munasabah oleh Mahkamah.

The above originating summons does not disclose a cause of action. There is no substantive issue for the court's determination. Had the court granted the injunction, the injunction would have been to preserve the *status quo* of the parties pending the determination of the substantive issue or cause of action. If indeed the debt is being disputed on substantial grounds, some effort ought to be made to state it in more detail with sufficient particulars. As it stood, there appears to be no substantive cause of action. Apart from the injunction, what other order could this court make bearing in mind that the relief prayed for is an injunction to prevent the defendant from filing a winding-up proceeding until further order.

Nik Hashim JC (as he then was) in *Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd* [1998] 2 MLJ 167, dealt with a preliminary objection in regard to the failure of the applicant to comply with O. 69 r. 4(2) of the RHC by not stating the grounds of the application in general terms on the notice of motion and this was what his Lordship said at p. 172 of the report:

In my view, a motion under Order 69, rule 4 of the RHC is synonymous to an appeal. Order 69, rule 4(2) is a special provision relating to an application to remit or set aside an award of an arbitrator. By its terms, the provision under the rule is mandatory and therefore obligatory. That being so, strict compliance with its provision is called for (*Ooi Chew Seng's* case). Accordingly, the notice of motion must contain the grounds. This is a basic requirement. The grounds must be stated within the four corners of the notice itself. Affidavit is not a ground, but it contains evidence. It is a separate document from the notice and its purpose is to verify the facts in the grounds. The affidavit cannot supply the missing grounds which are required to be set out in the notice of motion under rule 4(2) of Order 69 of the RHC. The rule requires only grounds in general terms to be stated in the notice itself. The notice without the grounds is incomplete and irregular. An incomplete notice is as good as no notice at all.

With respect all these cases can readily be distinguished as the intitulements and the reliefs prayed for were inadequate and lacking in specifics. Here, the intitulement brought into sharp focus O. 84 of the RHC; ss. 77, 88 and 93 of the Law Reform (Marriage And Divorce) Act 1976; ss. 3, 5, 10 and 11 of the Guardianship of Infants Act 1961; and s. 3 of the Married Women and Children (Maintenance) Act 1950. Order 84 of the RHC states that where there is pending an action or other proceedings by reason of which an infant is a ward of court, any application under the Guardianship of Infants Act 1961 with respect to that infant may be made by summons in the proceeding, but except in that case any such application must be made by originating summons. The plaintiff here proceeded by way of an originating summons and she rightly invoked the Guardianship of Infants Act 1961 as that Act was applicable to her. It is germane to mention that the Guardianship of Infants Act 1961 do not apply to persons professing the religion of Islam. In my judgment, there was no reason at all to dismiss the plaintiff's application in encl. 5 as it was filed by way of an originating summons (*V. Solai v. Mariayee* [1954] MLJ 256). Looking at encl. 5, a concise statement of the relief claimed in the proceedings begun by originating summons with sufficient particulars to identify the cause of action had been fulfilled by the plaintiff thereby falling within the ambit of O. 7 r. 3(1) of the RHC. As Gopal Sri Ram JCA once remarked in *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, 477:

> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

Without a doubt, these words ring true in the present case. The intitulement of the originating summons in encl. 5 stated with sufficient particularity the statutes which it relied upon to move this court and it was certainly not an embarrassing pleading as to warrant its dismissal. At this juncture it would be ideal to refer to the case of *R Saraswathy v. R. Palakrishnan* [1986] 1 CLJ 544; [1986] 2 MLJ 127, a decision of the then Supreme Court delivered by Wan Suleiman SCJ. The appellant there had claimed custody of her infant son under s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 as well as maintenance for him under s. 93(1) of the Act from the respondent, her husband. The parties had separated and the appellant and her son were living separately from the respondent in her parents' home. There was no pending action for divorce between the parties. The learned judge held that as there was no pending action for divorce neither s. 88(3) of the Law Reform

(Marriage and Divorce) Act 1976 nor s. 93(1) of the Act can be invoked. It was held that both on procedure and on the merits the application should be dismissed. The appellant appealed. On appeal, his Lordship Wan Suleiman SCJ held that the three Acts (Law Reform (Marriage and Divorce) Act 1976, the Guardianship of Infants Act 1961 and the Married Women and Children (Maintenance) Act 1950) were all applicable depending on the circumstances of a particular case and in the state of affairs surrounding that appeal the application under s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 was properly made. There would be no need for the parties to wait, until perhaps the unlikely event of their commencing a divorce action before making such an application. It is germane to mention that r. 102(1) of the Divorce And Matrimonial Proceedings Rules 1980 would save the day for the plaintiff. That rule states that non-compliance with these Rules meaning the Divorce And Matrimonial Proceedings Rules 1980 or any rule of practice in force shall not render the proceedings void unless the court shall so order but the court may on its own motion or on application of any party set aside any proceedings wholly or in part as irregular or order amendment on such terms as may be just. Rule 102(2) of the Divorce And Matrimonial Proceedings Rules 1980 states that any such application may be dismissed unless made within a reasonable time and before the applicant has taken any step in the proceedings with knowledge of the irregularity. Here, there was no application by the defendant to set aside encl. 5 wholly or in part as irregular. That being the case, this court is constrained to accept encl. 5 wholly.

I will now proceed to the second part of the defendant's preliminary objection and this relates to the purported contravention of O. 7 r. 2(1) of the RHC which states that every originating summons must be in Form 6, 7 or 8 whichever is appropriate. Basically, the defendant contends that the originating summons in encl. 5 had not followed the correct Form in that the plaintiff should have filed an originating summons requiring an appearance in Form 6 and not an originating summons which does not require an appearance in Form 7. The defendant further contends that the usage of Form 7 by the plaintiff has deprived the defendant of the opportunity of counterclaiming as provided for under O. 28 r. 7 of the RHC. This contention fails to take into account that the originating summons in encl. 5 is in regard to a proceeding relating to an infant boy and it is basically governed by O. 84 of the RHC. It is of crucial importance to note that O. 84 of the RHC merely states that when there is no pending action in respect of an infant, any application must be made by way of an originating summons. It is totally silent on which type of originating summons that must be used. That being the case, the plaintiff was free to select either Form 6 or Form 7 and obviously the plaintiff here has chosen Form 7 which did not require an appearance. The plaintiff was perfectly entitled to make a choice and a certificate of urgency was also filed as

reflected in encl. 2 imploring the court for an early date. Now, an originating summons without an appearance as in Form 7 allows the Registrar to fix a date for the hearing of the originating summons upon sealing of the same. On the other hand, an originating summons with appearance as in Form 6 will have to go through the cumbersome procedures as set out in O. 28 r. 2(1) of the RHC before a hearing date is given. As a matter of practice, an originating summons without appearance is almost invariably filed by legal practitioners in Johor Bahru for an expeditious hearing of an originating summons in respect of custody applications involving infants. Thus, the plaintiff in filing encl 5 was perfectly correct in adopting that mode of procedure.

Even if I am wrong in holding that encl. 5 did not contravene O. 7 r. 3(1) of the RHC and O. 7 r. 2 of the RHC, that non-compliance can be said to be a mere irregularity curable by O. 2 r. 1 of the RHC and O. 92 r. 4 of the RHC. As Gopal Sri Ram JCA succinctly said in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 3 AMR 3640, 3648:

> Previously, courts, in respect of their process and orders, maintained a distinction between irregularities and nullities. The former were curable, but the latter were not. This distinction did not lend much clarity to the law. Neither did it, in the preponderance of cases, advance the course of justice. After the coming into force of the Rules of the High Court, 1980, the distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of court result in their being curable irregularities and not nullities. Indeed it is quite inappropriate to say of an order or decision of a court of unlimited jurisdiction (such as the High Court and other superior courts) that it is a nullity.

Edgar Joseph Jr J (now FCJ) in *Rohana bte Ariffin v. Universiti Sains Malaysia, Hashim Hussin Yaacob v. Universiti Sains Malaysia* [1988] 1 CLJ 559; [1988] 2 MLJ 609 applied vigorously O. 2 r. 1(1) of the RHC to condone the breach of O. 53 r. 2(4) of the RHC and this was what his Lordship said at pp. 611 to 612 of the report:

> If, contrary to my primary opinion, I was wrong in the view I had taken regarding this part of the case, and there had been a breach of Order 53 rule 2(4), then, having regard to the circumstances, especially the fact that the respondent had suffered no prejudice, I condoned the breach by virtue of the powers conferred upon me by Order 2, rule 1(1).

In *Re CHS* [1997] 3 MLJ 152, the proceedings should have been commenced by way of an originating summons but instead the plaintiff proceeded by way of an originating motion. Augustine Paul JC (as he then was) was of the view that since nobody was prejudiced and based on the justice of the case and the urgency of the matter, the originating motion was treated as an originating summons.

a It is a correct statement of the law to say that every omission or mistake in practice or procedure should be regarded as an irregularity which the court could and should rectify so long as it would not cause an injustice. Mohamed Dzaiddin bin Haji Abdullah J (now FCJ) in *Perbadanan Pembangunan Pulau Pinang v. Chong Ah Yok* [1993] 2 CLJ 351 rectified an omission to strictly b follow Form 8A of the RHC as curable under s. 62 of the Interpretation Act 1967 and his Lordship's decision was confirmed by the then Supreme Court. The defendant has contended that he was prejudiced by the existence of encl. 5 as he was deprived of the right to counter claim. But a perusal of encl. 7, which is an affidavit in reply of the defendant, puts to rest the contention of c the defendant once and for all. By para. 29 of encl. 7, the defendant has conveniently counterclaimed for the custody of the boy. In my judgment there was no prejudice or injustice sustained by the defendant when the plaintiff filed the originating summons in encl. 5. Indeed if the defendant feels that he was prejudiced by the existence of encl. 5 he could have timeously applied to have it set aside. But alas, this was not done. Instead the defendant d responded by filing lengthy affidavits and these must be construed as taking a fresh step as envisaged under O. 2 r. 2(1) of the RHC. Likewise in the case of *Malayan United Finance Bhd v. Sun Chong Construction Sdn Bhd & Ors* [1995] 4 MLJ 741, Richard Talalla J ruled that the respondent had breached O. 2 r. 2(1) of the RHC when he failed to make his application to set aside e the judgment for irregularity within a reasonable time and instead took fresh steps by entering an appearance and filing a defence well after becoming aware of the alleged irregularity. At best, the non-compliance by the plaintiff was a mere inadvertence and was not calculated to prejudice the defendant. This was my judgment and I so hold accordingly.

f Finally, I will now proceed to the third preliminary objection of the defendant. It is the contention of the defendant that the High Court of Johor Bahru is not the proper and convenient forum to hear the originating summons in encl. 5. Lim Beng Choon J in the case of *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 held, *inter alia*, that a High Court located g at Penang or at Alor Setar is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state. Here, the originating summons in encl. 5 was filed on 10 June 10 1998 in the registry of the High Court of Johor Bahru. h At the material time too, the plaintiff and the infant were already residing in Johor Bahru and, consequently, it was quite logical for the plaintiff to commence proceedings in the High Court of Johor Bahru. I have deliberated at some length and I am constrained to hold that in the interest of the parties and for the ends of justice, always mindful of the nature of the application,

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the High Court of Johor Bahru is the right forum to hear the originating summons in encl. 5. I am fortified by the stand I take on the strength of the Federal Court's decision in *American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273; [1995] 1 AMR 253 where Peh Swee Chin FCJ speaking for the Federal Court succinctly said (at p. 263 of the report):

> The doctrine of *forum non conveniens* appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v. Consulax Ltd (The Spiliada)* [1986] 3 ALL ER 843 after a series of decisions, as described and set out so well in that very interesting and readable joint article by Prof. R.H. Hickling and Assoc Prof. Wu Min Aun *"Stay of Actions and Forum Non Conveniens"* [1994] 3 MLJ xcvii.
>
> The main judgment in *The Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v. Robinow* [1892] 19 R (Ct of Sess) 655, 668 as being the fundamental principle in regard to this doctrine i.e. that -
>
> > there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably for the interests of all parties and for the ends of justice.
>
> Lord Goff cautioned that the word *'conveniens'* in *forum non conveniens* meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.

That the High Court of Johor Bahru has the jurisdiction to hear encl. 5 cannot be disputed. In *Wee Chow Yong t/a Viena Music Centre v. Public Finance Bhd* [1990] 1 CLJ 176; [1989] 3 MLJ 509 at p. 512, Edgar Joseph Jr J (now FCJ) said that:

> The case of *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 reminds us of the familiar proposition that the High Court of each state in our country are but branches of the High Court of Malaya and that each branch has concurrent jurisdiction to entertain any civil proceeding regardless of whether the cause of action arose in another state.

In any event, the defendant has yet to take the necessary steps under s. 20 of the Courts of Judicature Act 1964 to transfer the case to the High Court of Seremban. Now, s. 20 of the Courts of Judicature Act 1964 provides that the distribution of business among the judges of the High Court is at the direction of the Chief Judge (*Chong Siew Choong v. Public Prosecutor* CLJ JT (14) 1996; [1996] 2 CLJ 823; [1996] 5 MLJ 65). It goes without saying that there can be no appeal against any direction given by the Chief Judge. By merely raising a technical objection would be inadequate and insufficient. It must be borne in mind that there was delay occasioned by the defendant's omission

to transfer the case to the High Court of Seremban under s. 20 of the Courts of Judicature Act 1964. That kind of omission was indeed prejudicial to the plaintiff's originating summons in encl. 5 bearing in mind the nature and urgency of that application. An application under the Guardianship of Infants Act 1961 generally provides for the guardianship, custody, rights and liabilities of the guardian of infants as well as control and management of the infants property. In the context of encl. 5, the originating summons merely seeks for guardianship, care, control and custody of a boy aged 1 year 8 months together with maintenance of RM500 for that boy. Thus, any further delay would be extremely prejudicial to the infant boy.

Reverting back to the case of *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [supra]*, factually it can readily be distinguished since that case involved a trial where witnesses would invariably be called to testify as opposed to the application in the originating summons of encl. 5 that can be effectually determined by affidavits. For these reasons, I have no hesitation in dismissing the defendant's preliminary objections with costs.

For the sake of expediency, the hearing of the originating summons in encl. 5 was fixed for hearing on 1 December 1998.